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APPENDIX

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Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1557

ALVIS G. SPEIGHT, t/a HAREM BOOK STORE, and JAMES L. CHANDLER,
Appellants,

v.

LEWIS R. SLATON, In his capacity as District Attorney, Atlanta Judicial Circuit, and
HINSON McAULIFFE, In his capacity as Solicitor, Criminal Court of Fulton County,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

FILED MAY 21, 1973
PROBABLE JURISDICTION NOTED
OCTOBER 15, 1973

Supreme Court of the United States

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DOCKET ENTRIES

August 28 – Complaint for preliminary injunction, permanent injunction, declaratory judgment, and THREE-JUDGE COURT, with Exhs. A and 1-4, filed. Summons issued and delivered to U. S. Marshal. Copies of complaint to Marshal for service on Gov. Carter & Atty. Gen. Bolton. To CAM.

September 5 – Marshal's returns on service executed as to Slaton & McAuliffe on 8/29/72, and as to Gov. Carter & Atty. Gen. Bolton on 8/30/72, filed.

September 11 – ORDER from Chief Judge Brown 5th Circuit designating District Judges Moye & O'Kelley & Circuit Judge Morgan to compose a Three Judge Court, filed. Copy to counsel.

September 13 – ANSWER of defts., filed. (includes request for abstension) (Copy at judge) Memorandum of Law in support of resp's requestion of abstension, filed. (1 Copy at judge)

September 17 – Hearing set before 3-judge panel for 12-21-72 at 10:30 a.m.; briefs requested by 12-7-72. Copy of notice to ea. judge, counsel, and Gov. and Atty. Gen. via certified mail RRR.

September 27 – Submitted on Deft's Request for Abstension.

October 5 – ORDER filed deferring consideration of deft's request for abstension until the time of the hearing. Copy to counsel and to ea. Judge.

November 28 – Deft's proposed stipulations of fact and conclusions of law, filed. (Copy to each Judge)

December 7 – Pltfs' brief in opposition to defts' request for abstension, filed. Copy to ea. Judge.

December 7 – Pltfs' proposed stipulations of fact and conclusions of law, filed. Copy to ea. Judge.

December 20 – Petrs' brief in support of their contention that the closing of a bookstore under the guise of abating a public nuisance is a prior restraint which violates the 1st, 5th, & 14th Amendments, filed. Copy to ea. Judge.

December 21 – HEARING before three-judge panel. Counsel were heard. Copy of Respondents' Brief in Supreme Court of U. S. No. 71-1051, filed. Mr. Fieldman to file copies for each judge. The Court took the matter under advisement. Copy of respondents' brief to ea. Judge (12/27/72) Steno-type notes of proceedings had 12/21/72, filed.

December 29 – Pltf's ltr. with items attached (1) ltr. to each judge; (2) Copy of complaint, etc. in C.A. No. 725131 – U.S.D.C. – ND of Ind. (3) Copy of decision of Indiana Ct. of Appeals; & (4) copy of Cert. for designation and order designating a 3 Judge Ct. – U.S.D.C. – S.C. – C.A. No. 72-769, filed. (Atty. advised in ltr. copy furn. to each judge).

January 22 – Pltf's ltr. with ltr. to each judge & copy of decision of three-judge ct. in District of New Jersey – C.A. No. 911-72, filed. (Atty. advised in ltr. copy furn. to each judge).

February 22 – 2 Judge Opinion & Order filed & entered with Circuit Judge Morgan dissenting – dismissing complaint, filed. (Copy to Counsel 2-27-73) & (Copy to each Judge).

February 26 – Pltfs' NOTICE OF APPEAL TO USSC, filed. Copy of notice to USSC w/ docket sheet & defts' counsel.

October 15 – Certified Copy of Order of U.S.S.C. noting probable jurisdiction, filed. (Copy to counsel, 10/15)

November 16 – Request from USSC to have file transmitted to their office, rec'd.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALVIS G. SPEIGHT t/a
HAREM BOOK STORE and
JAMES L. CHANDLER,
Plaintiffs,

v.

LEWIS R. SLATON,
In His Capacity as
District Attorney, Atlanta
Judicial Circuit; and

Civil Action File No. 17075

HINSON McAULIFFE,
In His Capacity as
Solicitor General, Criminal
Court of Fulton County,
State of Georgia,
Defendants,
Jointly and Severally.

Also Serve in Their Statutory
Capacity Only, Under
28 U.S.C. § *2284(2),* and Not
As Defendants, His Excellency
JIMMY CARTER, Governor of the
State of Georgia, State
Capitol, Room 203, Atlanta,
Georgia; and The Honorable

ARTHUR K. BOLTON, Attorney
General of the State of
Georgia, Judicial Building,
Room 132, Atlanta, Georgia.

COMPLAINT FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, DECLARATORY JUDGMENT, AND CONVOCATION OF THREE-JUDGE COURT
Filed August 28, 1972

TO THE HONORABLE, THE JUDGES OF SAID COURT:

Plaintiffs, by and through their attorneys at law, D. FREEMAN HUTTON, Esquire, ROBERT EUGENE SMITH, Esquire, and GILBERT H. DEITCH, complaining of Defendants herein jointly and severally, respectfully allege as follows:

I.

JURISDICTION

1.

This is a civil action whereby Plaintiffs, as their interests may appear, pray a preliminary and permanent injunction issue to restrain Defendants, and each of them, from attempting or continuing to attempt, to close Harem Book Store under the guise of abating a continuing public nuisance, purportedly under authority of enforcement of *Title 72, Georgia Code of 1933,* as amended, and the provisions thereof. Plaintiffs, as their interests may appear, pray, as well, for a declaratory judgment to determine the constitutionality of Georgia's Statutory Scheme in regard to "Nuisances" (*Title 72, Georgia Code of 1933,* as amended), as written and/or applied, insofar as they purport to relate to a business activity offering presumptively protected publications to the interested adult public under the penumbra of the *First Amendment,* or

as threatened to be applied herein. Insomuch as the within Complaint seeks injunctive relief against the use of a state statute by law enforcement officials, said Plaintiffs, as their interest may appear, pray that a statutory Three-Judge Court be designated to consider the questions preserved herein (*28 U.S.C. § 2281*).

2.

This is also a civil action whereby Plaintiffs, as their interests may appear, pray a preliminary and permanent injunction issue to restrain Defendants, and each of them, as well as their agents, servants, employees and/or attorneys and others under their direction and control, from acting under color of enforcement of *Georgia Code § 26-2103* (Ga. L. 1971, § 2, pp. 344-345) which declares that the use of premises in violation of the Code Chapter relating to distribution of obscene materials shall, in and of itself, constitute a public nuisance and authorize a closing thereof and to further restrain Defendants, and each of them, as well as their agents, servants, employees and/or attorneys and others under their direction and control, from acting under *Georgia Code §§ 72-701 and 72-702*, to effect a constitutionally prohibited prior restraint under the guise of abating a so-called continuing public nuisance. Plaintiffs, as their interests may appear, pray, as well, a declaratory judgment to determine the constitutionality of said *Georgia Code § 26-2103* (Ga. L. 1971, § 2, pp. 344-345), as written and/or as applied, and as threatened to be applied herein. Plaintiffs, as their interests may appear, pray that the Court issue a declaratory judgment on the constitutionality of said *Georgia Code § 26-2103* (Ga. L. 1971, § 2, pp. 344-345).

3.

This is also a civil action whereby Plaintiffs, as their interests may appear, pray a preliminary and permanent injunction issue to restrain Defendants, and each of them,

from acting under *Georgia Code* § *26-2104* (Ga. L. 1971, § 3, pp. 344-345) which authorizes that any press materials declared to be obscene by the provisions of *Chapter 26-21* of the *Georgia Code* as well as advertisements for any such press materials (although themselves not obscene in the constitutional sense) are under said law determined to be contraband, and subject to forfeiture and destruction. Plaintiffs, as their interests may appear, pray, as well, for a declaratory judgment as to the constitutionality of said *Georgia Code* § *26-2104* (Ga. L. 1971, § 3, pp. 344-345), as written and/or as applied, and as threatened to be applied herein.

4.

This is also an action whereby Plaintiffs, as their interests may appear, pray a preliminary and permanent injunction issue to restrain Defendants, and each of them, from utilizing *Georgia Code* § *26-2101* (Ga. L. 1968, pp. 1249, 1302; Ga. L. 1971, p. 344), to determine the obscenity of the merchandise and inventory of the Harem Book Store declared obscene. Plaintiffs, as their interests may appear, pray, as well, for a declaratory judgment as to the constitutionality of said *Georgia Code* § *26-2101* (Ga. L. 1968, pp. 1249, 1302; Ga. L. 1971, p. 344), as written and/or as applied, and as threatened to be applied herein.

5.

Jurisdiction is conferred on this Court for the resolution of the substantial constitional questions herein presented by 28 U.S.C. § 1343(3), which provides, in pertinent part, that the District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> "To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage of any right, privilege or immunity secured by the *Constitution of the United States* . . . ",

and the organic law which authorizes the institution of this suit founded on *42 U.S.C. § 1983*, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory subjects or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the *Constitution* and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Suit is further founded on *28 U.S.C. § 1343(4)* "to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights . . . ", as well as *Article III, Section 2* of the *Constitution of the United States.*

Prayer for Injunctive Relief is founded on *Rule 65* of the *Federal Rules of Civil Procedure.*

Prayer for Declaratory Relief is founded on *Rule 57* of the *Federal Rules of Civil Procedure*, as well as *28 U.S.C. § 2201.*

Jurisdiction for convocation of a Three-Judge Court is founded on *28 U.S.C. §§ 2281 and 2284.*

The jurisdiction of this Court is also invoked under *28 U.S.C. § 1331*, this being a civil action wherein the matter in controversy exceeds, exclusive of interest and costs, the sum and value of Ten Thousand ($10,000.00) Dollars, and applies under the *Constitution* and the laws of the United States.

II.

PARTIES

6.

Plaintiff, Alvis G. Speight, trading as the Harem Book Store, located at 2979 Campbellton Road, S.W., Atlanta, Georgia, is engaged, through his agents, servants, and employees, in the sale and offering for sale of books, magazines, newspapers, movie films, pictures, and other press materials which are presumptively protected under the *First Amendment* to the *Constitution of the United States*, pursuant to applicable City of Atlanta business licenses.

The press materials offered for sale by the Harem Book Store are comparable to those declared not to be obscene by the Supreme Court of the United States, and many other inferior Federal Courts, as well as various state appellate courts and, hence, are protected expression under the *First Amendment* to the *Constitution of the United States*, as made applicable to the States under the *Fourteenth Amendment*.

No sales or offerings are made by the Harem Book Store to persons under eighteen years of age (minors) of any of the sexually-oriented press materials distributed or offered for distribution by the Harem Book Store, nor are they "pandered" in the *Ginzburg*-sense (*Ginzburg v. U.S.A.*, 383 U.S. 463 [1966]), nor are the press materials sold or offered for sale in a way that intrudes impermissibly into the privacy of an unwilling adult who wishes to avoid confrontation therewith.

Prior to July 1, 1972, when the legal age of majority in the State of Georgia was lowered to eighteen (18) years of age from twenty-one (21) years of age, the agents, servants and employees of the Harem Book Store made no sales or offerings to persons under the age of twenty-one (21).

7.

James L. Chandler, Plaintiff herein, is a Lessee of the premises at 2979 Campbellton Road, S.W., Atlanta, Georgia, where the Harem Book Store is located. Plaintiff Chandler is nominally obligated as Lessee of the said premises for the rent due thereon and is included herein to protect his interests in the premises as they may appear.

8.

Defendant Lewis R. Slaton is named as a defendant solely in his capacity as District Attorney for the Atlanta Judicial Circuit, and as the official authorized by Georgia law to abate a public nuisance, under color of enforcement of the statutes of the State of Georgia.

9.

Defendant Hinson McAuliffe is named as a defendant solely in his capacity as Solicitor General for the Criminal Court of Fulton County, and as an official purporting to be authorized by Georgia statute to abate a public nuisance.

10.

The named Defendants, in their official capacities only, as aforesaid, are joined herein to make enforceable and binding upon them and/or their agents, servants, employees or attorneys, and others under their direction and control, the preliminary and/or permanent injunction, declaratory judgment and/or other relief that may be granted by this Court.

III.

FACTUAL ALLEGATIONS

11.

At all times relevant hereto, Defendants and/or their agents, servants or employees, and others acting under their direction and control, and each of them, separately and in concert, under color and pretense of law, to-wit: under color of enforcement of state statutes, custom and usage of the said statutes referred to hereinabove, have deprived, are continuing to deprive, and threaten further to deprive Plaintiffs, as their interests may appear, their agents, servants, and employees, of rights, privileges and immunities guaranteed to them by the *First, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States,* as well as depriving interested adult citizens of the State of Georgia, and visitors thereto, of access to nonobscene press materials protected by the *First* and *Fourteenth Amendments* to the *Constitution of the United States,* which press materials are offered for sale or sold under nonobtrusive circumstances to interested adults only.

12.

The use of the premises at 2979 Campbellton Road, S.W., Atlanta, Georgia, as a bookstore is consistent with the approved usages for properly zoned, as it is, in the "C-2" classification.

13.

At all times material hereunto, the Harem Book Store has been conducted without any overt breaches of the peace or other interference with the rights of others passing by said premises.

14.

On four occasions since the Harem Book Store opened more than one year ago, agents of the Defendant McAuliffe have purchased a total of thirteen (13) magazines which Defendants contend are obscene. None of said magazines has ever been declared to be obscene in the constitutional sense, and Plaintiffs herein, as their interest may appear, affirm that such press materials are not obscene as a matter of law in the constitutional sense, within the meaning of such term as enunciated by the decisions of the Supreme Court of the United States.

15.

No person, employee or otherwise, has ever been convicted of the commission of a statutory offense at the premises occupied by the Harem Book Store, including the offense of distributing so-called obscene materials in violation of *Georgia Code § 26-2101.*

16.

Despite the facts as alleged herein, and in reckless disregard of decisional law enunciated by the United States Supreme Court dealing with press materials and the *First Amendment,* Defendants have instituted a civil suit in the Superior Court of Fulton County, Georgia, in bad faith, for the purpose of harassing Plaintiffs, as their interests may appear, and effecting irreparable harm, demanding, *inter alia,*

(a) "... injunctions, both temporary and permanent, against the conduct and operation of the Harem Book Store, in and on the premises at No. 2979 Campbellton Road, S.W., in the City of Atlanta, Fulton County, Georgia, by any person;" and,

(b) "... an order declaring all merchandise on said premises as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed;" and

(c) "that a Rule Nisi be issued instanter requiring the defendants named herein (plaintiffs in this action) to show cause why the prayers of this complaint should not be granted."

The suit docketed as Civil Action File No. B-77630 is styled:

"LEWIS R. SLATON AS DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT, AND HINSON MCAULIFFE, AS SOLICITOR GENERAL, CRIMINAL COURT OF FULTON COUNTY, GEORGIA

vs.

CERTAIN PREMISES AT NO. 2979 CAMPBELLTON ROAD, S.W., ATLANTA FULTON COUNTY, GEORGIA; THE BUSINESS CONDUCTED THEREON, KNOWN AS THE HAREM BOOK STORE; THE OBSCENE MATERIALS IN AND ON SAID PREMISES; JAMES L. CHANDLER, LESSEE OF SAID PREMISES; AND ALL OTHER PERSONS ASSISTING AND ABETTING IN THE OPERATION OF THE HAREM BOOK STORE".

A copy of the said Complaint seeking to close the Harem Book Store and prohibit all future distribution of press materials purportedly as a public nuisance and which further seeks forfeiture and destruction of all press materials contained therein is attached hereto as Exhibit "A" and made a part of this Complaint, being incorporated herein by reference.

17.

Under the said Complaint, Plaintiffs, as their interests may appear, have been ordered by the Honorable Claude D. Shaw, Judge, Atlanta Judicial Circuit, Fulton Superior Court, to show cause before him, "then and there to be heard," why the prayers of the Complaint referred to in paragraph 16 hereof should not be granted, placing the burden of proceeding on those seeking to exercise *First Amendment* rights, which procedure has been declared repugnant to the *First Amendment* to the *Constitution of the United States (Freedman v. Maryland,* 380 U.S. 51 [1965]; *Teitel Film Corporation v. Cusack,* 390 U.S. 139 [1968]; *Carroll v. President and Commissioners of Princess Anne County,* 393 U.S. 175 [1968] and *Blount v. Rizzi, et al,* 400 U.S. 410 [1971]).

18.

Defendants knew or should have known that no violation of Georgia statutes, to-wit: *Georgia Code* §*26-2101,* has been alleged and proved in any court of law against Plaintiffs herein, or any of their agents, servants, and employees, relating to the Harem Book Store located at 2979 Campbellton Road, S.W., Atlanta, Fulton County, Georgia, prior to the institution of the Complaint attached hereto and identified as Exhibit "A".

Further, Plaintiffs affirm that in a criminal prosecution charging Plaintiff James L. Chandler, brought in the Criminal Court of Fulton County, by the agents, servant, and employees of Defendant McAuliffe charging violation of State of Georgia Obscenity law, after a trial of three (3) days, a mistrial was declared by the Honorable Daniel Duke, Judge, because the jury was unable to reach a unanimous verdict. (The jury remained in deadlock at four (4) to (1) in favor of acquittal.)

19.

The resort to utilization of the concept of public nuisance authorized by Georgia Statutes by the Defendants in order to shut down the Harem Book Store and forbid press materials to be sold there as well as seeking the forfeiture and destruction of all the press materials contemporaneously being offered for sale at said store, without regard to whether or not each and every single publication can be said to be obscene in the constitutional sense, and indeed, the said Complaint, as sanctified by verification, states, in part, as follows:

> "Said books, magazines and motion picture films and said imitation penises and phallic objects constitute one stock of merchandise all of which is pandered as being in the nature of hard-core pornography and the major portion or a substantial portion of such stock of merchandise is such hard-core pornography, and plaintiffs say that the entire stock of merchandise is accordingly subject to condemnational and forfeiture." (Exhibit "A", p. 3.)

Further, Defendants also, by their proceedings in enforcement of said Georgia Statutes, attempt to circumvent the safeguards of the criminal process with its requirement of proof beyond a reasonable doubt before a jury and substitute therefore a lesser, civil, burden of proof, to-wit: the preponderance of the evidence standard, and a judge.

Said attempt is, in truth and fact, a bad faith effort to force the cessation of sales of all materials in the said store without regard to whether constitutionally protected. (See paragraph 4 of the Complaint attached as Exhibit "A".)

The Defendants and/or their agents, servants, and employees have thus established a pattern of conduct under

color of enforcement of state law and customs under facially invalid statutes of attempting the ultimate suppression of presumptively protected publications and materials without, to this date, ever having had any judicial determination by adversary proceedings that any of said publications or materials offered for sale or sale are, in fact, obscene in the constitutional sense, and unless restrained, Defendants and/or their agents, servants and employees, will perpetuate a "chilling effect" upon the exercise of Plaintiffs' *First Amendment* rights as well as the right of interested adult citizens of the City of Atlanta and the State of Georgia, and of the other forty-nine states who may visit Georgia and who wish to exercise their *First Amendment* right to buy, review and view nonobscene publications and films. The efforts on the part of Defendants to close Plaintiffs' business, beginning almost from the date on which Plaintiffs lawfully complied with the licensing requirements for bookstores and the zoning ordinance then in effect, and opened the business, the threatened closure under the guise of the "abatement of a public nuisance" constitute attempts at a constitutionally invalid "prior restraint" which is condemned by the *First, Fourth, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States.*

IV.

BASIS IN LAW FOR RELIEF

22.

The aforesaid conduct of Defendants, their agents, servants, employees and attorneys, and others acting under their direction and control, and each of them, in seeking to close the Harem Book Store under the guise of abating a nuisance constitutes an invalid "prior restraint", condemned by the *Constitution of the United States* and threatens to have and has had a "chilling effect"on the exercise of

Plaintiffs' constitutional rights, more particularly, the *First, Fourth* and *Fifth Amendments* thereof, as made obligatory on the states under the *Fourteenth Amendment.* The conduct of Defendants, their agents, servants, and employees, in seeking to close Plaintiffs' business is deprivation of Plaintiffs' rights to due process under the *Fifth Amendment* to the *Constitution,* as well as an all too effective restraint on the exercise of Plaintiffs' right to sell and distribute presumptively protected materials to the interested adult public.

23.

If as a result of the Defendants' actions, the Harem Book Store is shuttered, and the press materials contained therein forfeited and destroyed, then the interested adult public will be deprived of access to publications; other business establishments offering press materials to the interested adult public in and around the City of Atlanta will be forced to engage in "self-censorship" causing "chilling of speech", further threatening to deprive said interested adult citizens of such press materials which they have a constitutional right to read and possess; and further, Plaintiffs herein, as their interests may appear, will be irreparably harmed as a result of the substantial interference with advantageous business relations.

24.

By reason of the conduct of the Defendants, their agents, servants, employees and attorneys, and others under their direction and control, as aforesaid, the civil rights of Plaintiffs under the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *United States Constitution* have been violated to their irreparable harm. Unless enjoined, Defendants, their agents, servants, employees and attorneys, will cause further imminent and irreparable harm to Plaintiffs for which they have no plain, adequate remedy at law, and the conduct of Defendants, their agents, servants, employees

and attorneys, had had and threatens to have a continuing "chilling effect" on the Plaintiffs' exercise of their *First Amendment* freedoms. Immediate and irreparable injury, incalculable loss, and damage will result to Plaintiffs if a Preliminary Injunction is not issued, forbidding Defendants, their agents, servants, employees and attorneys, from continuing in their proposed, wholly illegal conduct as aforesaid, under color of enforcing said state statutes.

25.

The provisions of *Georgia Code* § *26-2101* (Ga. L. 1968, pp. 1249, 1302, Ga. L. 1971, p. 344) are repugnant to the *First, Fourth Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* in the following respects:

(a) Said statutory provisions are void for vagueness in that the same prohibit the doing of an act in terms so vague, fluid, and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof and, as such, are repugnant to the due process provisions of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States,* and further,

(b) Said statutory provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth standards at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court in *First Amendment* matters; and further,

(c) The said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by Defendants and have a "chilling and inhibiting effect" on the exercise of the Federal and State constitutional rights of citizens of the State of Georgia and of the United States, as

well as those of Plaintiffs, to publish, distribute circulate, sell,, receive, and/or purchase materials presumptively protected by the *First Amendment;* and further,

(d) Such statutory provisions are repugnant to the substantive due process provisions of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States,* because they permit deprivation of liberty and/or property interests for the exercise of *First Amendment* rights by unreasonable, arbitrary, and capricious means by Defendants and/or their agents, servants, employees, and attorneys without a showing of a real and substantial relationship to any State's subordinating interest which is compelling to justify State action limiting the exercise by Petitioner of *First Amendment* freedoms; and further,

(e) Said statutory provisions are impermissibly broad and repugnant to the procedural due process requirements of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* by employing means lacking safeguards which due process demands to assure nonobscene materials sought to be distributed as a business activity, the constitutional protection of the *First Amendment,* to which it is entitled; and further,

(f) Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fourth, Fifth,* and *Fourteenth Amendments* to the *Constitution of the United States,* in that said statutory provisions permit inherent powers of censorship and suppression, constituting a prior restraint of the exercise of Plaintiff's *First Amendment* rights by Defendants.

(g) Said statutory provisions are further void for overbreadth in that they do not limit prosecutions to materials which are sold without notice to the public of their nature or without reasonable protection against exposure of the materials to juveniles.

Georgia Code § *26-2103* (Ga. L. 1971, pp. 344, 345; Section 2 of Act 304, 1971) and *Title 72* of the *Georgia Code of 1933, as amended,* are repugnant to the *First, Fourth, Fifth, Sixth,* and *Fourteenth Amendments* to the *Constitution of the United States* for the following reasons:

(a) Said statutes and their application to Plaintiffs constitute a classical "prior restraint" on materials which are presumptively protected under the *First Amendment* to the *Constitution of the United States,* which has been condemned by the Supreme Court of the United States in an unbroken string of cases beginning with Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931) and continuing through recent terms of that Court with its decisions in *New York Times Company v. United States,* 403 U.S. 713 (1971), and *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971).

(b) *Georgia Code* § *26-2103* denies due process and equal protection of the laws to Plaintiffs in that said statute makes a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of a single, isolated transaction as to only one of possibly thousands of presumptively protected publications and materials without any showing of traditional elements necessary to constitute a continuing public nuisance; all of which is repugnant to the *First, Fifth,* and *Fourteenth Amendment* to the *Constitution of the United States.*

(c) Moreover, *Georgia Code* §*26-2103,* by labelling a place of business a public nuisance on the basis of a single, isolated transaction, creates an invalid presumption of the type condemned by the United States Supreme Court in *Leary v. United States,* 395 U.S. 1532, 23 L. Ed. 2d 57, in that it violates the *Fifth* and *Fourteenth Amendments* of the *Constitution of the United States.*

(d) Moreover, said statutory presumption deprives Plaintiffs of their *Fifth* and *Fourteenth Amendment* rights under the *Constitution of the United States* to have *every* element making up a nuisance to be proven, by competent evidence, in a *First Amendment* context, beyond a reasonable doubt.

27.

Georgia's Nuisance Statute, *Title 72* of the *Georgia Code of 1933, as amended*, as written and/or as applied to Plaintiffs, is repugnant to the *Constitution of the United States* in that:

(a) Said statutory scheme's provisions are void for vagueness in that the same prohibit the doing of an act in terms so vague, fluid, and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof and, as such, are repugnant to the due process provisions of the *Fifth* and *Fourteenth Amendment* to the *Constitution of the United States;* and further,

(b) Said provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth standards at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court in *First Amendment* matters; and further,

(c) The said provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptibel of sweeping and improper application by Defendants and have a "chilling and inhibiting effect" on the exercise of the Federal and State constitutional rights of citizens of the State of Georgia and of the United States, as well as those of

Plaintiffs, to publish, distribute, circulate, sell, receive, and/or purchase printed publications; and further,

(d) Said provisions are repugnant to the substantive due process provisions of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* because they permit deprivation of liberty and/or property interests for the exercise of *First Amendment* rights by unreasonable, arbitrary, and capricious means by Defendants and/or their agents, servants, employees and attorneys without a showing of a real and substantial relationship to any subordinating interest of the State of Georgia which is compelling to justify action limiting the exercise by Plaintiffs of *First Amendment* freedoms; and further,

(e) Said provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fifth,* and *Fourteenth Amendments* to the *Constitution of the United States* in that said provisions permit inherent powers of censorship and suppression, constituting a prior restraint of the exercise of Plaintiff's *First Amendment* rights by Defendants.

(f) Said provisions, as applied, or as threatened to be applied by Defendants to Plaintiffs are repugnant to the *First* and *Fourteenth Amendments* to the *Constitution of the United States* in that they lack adequate safeguards against undue inhibition of materials which are entitled to the protection of the *First Amendment.*

V.

RELIEF SOUGHT

28.

Plaintiffs are further entitled to and desire that this Court enter a declaratory judgment on final hearing under the provisions of *28 U.S.C. §2201* and *Rule 57, Federal Rules of*

Civil Procedure, declaring *Title 72, Georgia Code of 1933*, as amended; *Georgia Code*, §*26-2101* (Ga. L. 1968, 1249, 1302; Ga. L. 1971, p. 344); *Georgia Code* § *26-2103* (Ga. L. 1971, Section 2, pp. 344, 345), and *Georgia Code* §*26-2104* (Ga. L. 1971, Section 3, pp. 344, 345) as written and/or applied, are unconstitutional for the aforesaid reasons.

29.

Plaintiffs are entitled to and desire that a three-judge court be convened to determine the constitutionality of said statutes pursuant to *28 U.S.C.* §§ *2281 and 2284* and issue a preliminary and permanent injunction restraining and enjoining each of the Defendants, their agents, servants, employees, and attorneys, and any and all other persons acting under their direction and control, and each of them, and persons in active concert with them from proceeding against Plaintiffs in enforcing said statutes against Plaintiffs pursuant to authority granted by them, as contemplated in the said State Court Action referred to hereinbefore.

WHEREFORE, Plaintiffs pray:

1. That a three-judge court be convened to hear and decide the issues raised herein;

2. That a preliminary injunction issue upon hearing restraining Defendants, and/or their agents, servants, employees, and attorneys, pending a hearing and determination of Plaintiffs' application for permanent injunction from proceeding against Plaintiffs in enforcing the said statutes referred to in Paragraph 29 herein or proceeding against Plaintiffs pursuant to authority granted by them, as contemplated in the state court action referred to above.

3. That after final hearing said injunctions be made permanent and said statutes referred to above be declared

unconstitutional as written and/or as applied to the controlled distribution of adult-type publications and materials to persons eighteen (18) years of age or older in a nonobtrusive manner, absent *"Ginzburg"*-type pandering, by Plaintiff Speight herein; and

4. That a prelimianry and permanent injunction issue restraining Defendants, their agents, servants, employees, and attorneys and any and all other persons acting under their direction and control from (a) enforcing or acting under said statutes referred to in Paragraph 28 herein in an unconstitutional manner or to apply them in a manner to obtain unconstitutional results with respect to these Plaintiffs, their agents, servants, and employees.

5. That the Governor and the Attorney General of the State of Georgia be given notice by registered mail of the pendency of the Plaintiffs' application for preliminary injunction, as required by *28 U.S.C. § 2284(2).*

6. That Plaintiffs have such other and further relief as may be appropriate under the circumstances in this case together with costs.

Respectfully submitted,

D. FREEMAN HUTTON, Esquire
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1175 Peachtree Street, N.E.
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(404) 892-8890

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Suite 507
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Towson, Maryland, 21204
(301) 821-6868

Counsel for Plaintiffs.

STATE OF GEORGIA
COUNTY OF FULTON

VERIFICATION

Personally appeared before me, the undersigned attesting officer, ALVIS G. SPEIGHT and JAMES L. CHANDLER, Petitioners herein, and after first being duly sworn, depose and say that the facts alleged in the above and foregoing *Complaint for Preliminary Injunction, Permanent Injunction, Declaratory Judgment, and Convocation of Three-Judge Court* are true and correct, to the best of his current knowledge, information, and belief, respectively.

ALVIS G. SPEIGHT

JAMES L. CHANDLER

SWORN TO AND SUBSCRIBED before me,
this 25th day of August, 1972.

D. FREEMAN HUTTON
Notary Public

(SEAL)

THE SUPERIOR COURT FOR THE COUNTY OF FULTON STATE OF GEORGIA

LEWIS R. SLATON AS DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT, AND HINSON MCAULIFFE, AS SOLICITOR GENERAL, CRIMINAL COURT OF FULTON COUNTY, GEORGIA

vs. CIVIL ACTION

CERTAIN PREMISES AT NO. 2979 CAMPBELLTON ROAD, S.W., ATLANTA, FULTON COUNTY, GEORGIA; THE BUSINESS CONDUCTED THEREON, KNOWN AS THE HAREM BOOK STORE; THE OBSCENE MATERIALS IN AND ON SAID PREMISES; JAMES L. CHANDLER, LESSEE OF SAID PREMISES; AND ALL OTHER PERSONS ASSISTING AND ABETTING IN THE OPERATION OF THE HAREM BOOK STORE

FILE NO. B-77630

COMPLAINT

EXHIBIT "A"

1.

Plaintiffs complain under the provisions of Sections 26-2103 and 26-21-4 of the Criminal Code of Georgia against the premises at No. 2979 Campbellton Road, S.W. in the City of Atlanta, Fulton County, Georgia, and the business conducted thereon known and designated as the Harem Book Store, as a public nuisance, and against the obscene materials in and on said premises as contraband.

2.

Upon information and belief plaintiffs allege that James L. Chandler, who resides at No. 3649 Buford Highway, Apartment C-5, DeKalb County, Georgia, is the lessee of said

premises, and the owner and operator of the aforesaid Harem Book Store.

3.

Said premises and business have been used, are now being used, and, unless prevented by judicial action, will continue to be used for the advertising, storage, sale, and exhibition for sale of materials obscene within the meaning of Section 26-2101 of the Criminal Code of Georgia. Said activities are being conducted by the aforesaid Chandler, and by various agents, servants and employees of the aforesaid Chandler whose names and addresses are not alleged because of the rapid rate of change or turnover in such personnel.

4.

Said materials consist of books, magazines, and motion picture films, each and all of which contain photographs, still or moving, of one or more of the following:

a) Acts of sexual intercourse, real and simulated;

b) acts of anal intercourse, real and simulated;

c) acts of cunnilingus, real and simulated;

d) acts of fellatio, real and simulated;

e) acts of other sexual activity, including but not limited to photographs of persons fondling female breasts, and persons fondling the genitals of themselves and of others, both men and women.

5.

The signs on the exterior of the building on said premises housing the Harem Book Store, which is located on a main thoroughfare in the City of Atlanta, are designed and calculated to convey to adult male viewers the message that the material for sale within is of a salacious and prurient nature.

6.

Within said building in said place of business there are stored, sold and exhibited for sale imitations of large erect penises and other phallic objects, in immediate juxtaposition to books, magaines and motion picture films of the nature set forth in this complaint. A suggestively garbed female dummy with vagina exposed also occupies a prominent position in said building.

7.

Plaintiffs say that the business of the Harem Book Store is the commercial exploitation of erotica solely for the sake of their prurient appeal.

8.

Plaintiffs say, further, that the books, magazines, and motion picture films so being advertised, stored, sold and exhibited for sale are commingled and not segregated by categories having regard for such as is within and such as is without the protection of the First Amendment of the Constitution of the United States and Art. 1, Sec. 1, Par. 15 of the Georgia Constitution (Code Ann., Sec. 2-115). Said books, magazines and motion picture films and said imitation penises and phallic objects constitute one stock of merchandise all of which is pandered as being in the nature of hard-core pornography and the major portion or a substantial

portion of such stock of merchandise is such hard-core pornography, and plaintiffs say that the entire stock of merchandise is accordingly subject to condemnation and forfeiture. Attached hereto and incorporated by reference as Plaintiff's Exhibit "A" are a series of photographs which truly and accurately portray the exterior signs, interior displays of the aforesaid materials, imitation penises and the female dummy referred to in paragraph Six.

9.

On July 28, 1971, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

a) Sex in Marriage, The Photo Magazine of Marital Sex Education, Volume One, Number Two, $6.00, Academy Magazines Division of Academy Press, publisher.
b) Primer of Sexual Education, Volume Three, $600, Calga Publishers.
c) The Sexual Man, Collector's First Edition, Vol. 1, $6.00, SECS Press.

The sale of each of said magazines was unlawful because each and all of said magazines were obscene within the meaning of Georgia Code Section 26-2101.

10.

On August 14, 1971, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

a) Cavewomen, A.P.E.C. Magazine No. 25, $3.50, Publisher's Export Company, Inc.

b) The Savages, A.P.E.C. Magazine No. 14, $3.50 Publisher's Export Company, Inc.
c) Foreplay, A Sensuous New Erotic Probe into the World of Sex, $6.00

The sale of each of said magazines was unlawful because each and all of said magazines were obscene within the meaning of Georgia Code Section 26-2101.

11.

On November 24, 1971, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

a) AWARE, Volume One, Number Two, $6.00.

The sale of each of said magazine was unlawful because each and all of said magazine was obscene within the meaning of Georgia Code Section 26-2101.

12.

On May 31, 1972, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

a) More Than 7 Inches, #2, $6.00.

b) Gay Sex Guide, Volume 1, $6.00.

c) Affaire, No. 7, $7.50.

d) Love Theme, Vol. 1, No. 4, $4.50.

e) The Special, No. 5, $5.00, Pnd.

f) Affaire, No. 9, $6.00.

The sale of each of said magazines was unlawful because each and all of said magazines were obscene within the meaning of Georgia Code Section 26-2101.

WHEREFORE Plaintiffs demand:

1) Summons and an appropriate order for service of summons issued, and of all rules and orders.

2) For an interlocutory injunction:

a) For injunctions, both temporary and permanent, against the conduct and operation of the Harem Book Store, in and on the premises at No. 2979 Campbellton Road, S.W., in the city of Atlanta, Fulton County, Georgia, by any person.

b) For an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forefeited and destroyed.

3) That a Rule Nisi be issued instanter requiring the defendants named herein to show cause why the prayers of this complaint should not be granted.

Respectfully submitted,

/s/ CARTER GOODE
Assistant District Attorney
Atlanta Judicial Circuit

/s/ JOEL M. FELDMAN
Assistant District Attorney
Atlanta Judicial Circuit

/s/ THOMAS E. MORAN, JR.,
Assistant Solicitor General
Criminal Court of Fulton County

THE SUPERIOR COURT FOR THE COUNTY OF FULTON STATE OF GEORGIA

LEWIS R. SLATON AS DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT, AND HINSON MCAULIFFE AS SOLICITOR GENERAL, CRIMINAL COURT OF FULTON COUNTY, GEORGIA

vs. CIVIL ACTION,

CERTAIN PREMISES AT NO. 2979 CAMPBELLTON ROAD, S.W., ATLANTA, FULTON COUNTY, GEORGIA; THE BUSINESS CONDUCTED THEREON, KNOWN AS THE HAREM BOOK STORE; THE OBSCENE MATERIALS IN AND ON SAID PREMISES; JAMES L. CHANDLER, LESSEE OF SAID PREMISES; AND ALL OTHER PERSONS ASSISTING AND ABETTING IN THE OPERATION OF THE HAREM BOOK STORE

FILE NO. _____
COMPLAINT

VERIFICATION

Personally comes Joel M. Feldman, who, being first duly sworn, on oath says that he is an Assistant District Attorney of the Atlanta Judicial Circuit; that he is an attorney for the

plaintiffs in the captioned complaint; that he has knowledge of the facts stated in said complaint; and that the allegations of fact in said complaint are true.

/s/ JOEL M. FELDMAN

Sworn to and subscribed before me this the 21 day of Aug., 1972.

/s/ Juanita Kersein
Notary Public GA. State at Large

THE SUPERIOR COURT FOR
THE COUNTY OF FULTON
STATE OF GEORGIA

LEWIS R. SLATON AS DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT, AND HINSON MCAULIFFE, AS SOLICITOR GENERAL, CRIMINAL COURT OF FULTON COUNTY, GEORGIA

vs.

CERTAIN PREMISES AT NO. 2979 CAMPBELLTON ROAD, S.W., ATLANTA, FULTON COUNTY, GEORGIA; THE BUSINESS CONDUCTED THEREON, KNOWN AS THE HAREM BOOK STORE; THE OBSCENE MATERIALS IN AND ON SAID PREMISES; JAMES L. CHANDLER, LESSEE OF SAID PREMISES; AND ALL OTHER PERSONS ASSISTING AND ABETTING IN THE OPERATION OF THE HAREM BOOK STORE

CIVIL ACTION,
FILE NO. _____
COMPLAINT

ORDER

This complaint having been read and considered:

IT IS ORDERED:

1. That summons issued and service be made by the sheriff, instanter upon

   a. The premises known as the Harem Book Store, located at 2979 Campbellton Road, S.W., Atlanta, Fulton County, Georgia by posting a copy of the complaint, summons, and this order in a conspicuous place in said premises and personally the persons located therein and in charge of said premises.

   b. James L. Chandler, Apartment C-5, 3649 Buford Highway, DeKalb County, Georgia.

Said summons shall require the Respondents to show cause, within 48 hours from service thereof, before this court, why the prayers of the complaint should not be granted.

2. Respondents show cause before me, then and there to be heard, at 9:30 A.M., the 25 day of Aug., 1972 why the prayers of the complaint should not be granted.

This the 21 day of Aug., 1972.

/s/ CLAUDE D. SHAW
JUDGE, FULTON SUPERIOR COURT
Atlanta Judicial Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALVIS G. SPEIGHT t/a
HAREM BOOK STORE and
JAMES L. CHANDLER,
Plaintiffs,
versus
LEWIS R. SLATON,
In His Capacity as
District Attorney,
Atlanta Judicial Circuit; and
HINSON McAULIFFE,
In His Capacity as
Solicitor General, Criminal
Court of Fulton County,
State of Georgia,

Defendants,
Jointly and Severally.

CIVIL ACTION
FILE NUMBER _____

AFFIDAVIT OF ROBERT EUGENE SMITH, ESQ. IN SUPPORT OF INJUNCTION AND DECLARATORY RELIEF

STATE OF GEORGIA

COUNTY OF FULTON

ROBERT EUGENE SMITH, being first duly sworn, deposes and says:

1. I am an attorney licensed to practice in the State of Maryland, and one of the attorneys representing Plaintiffs in the above styled and numbered cause.

2. It is my opinion that the Georgia statutes under which Defendants herein purport to act are unconstitutional as written and applied in the factual context set forth in the Complaint to which this Affidavit is attached and represents a constitutionally prohibited prior restraint.

3. My experience in the obscenity area has been extensive and I have argued the following obscenity cases in the United States Supreme Court orally or by brief:

A. *Central Magazine Sales, Ltd. v. United States,* 389 U.S. 50 (1967).

B. *Bloss v. Dykema,* 398 U.S. 278 (1970).

C. *Bloss v. Michigan,* 402 U.S. 928 (1971).

D. *Burgin v. South Carolina,* 404 U.S. 806 (1971).

E. *United States v. The Book Bin,* 400 U.S. 410 (1971).

F. *Mitchum v. Foster,* 407 U.S. 225, 32 L.Ed.2d 705 (1972).

I have also argued numerous cases in the United States Courts of Appeal, United States District Courts, and multiple State Appellate Courts.

I have appeared in cases in approximately thirty-eight (38) states of the United States in connection with the procedural and substantive factors involved in the area of obscenity litigation.

4. I further appeared in the case of *United States v. The Book Bin* in this jurisdiction on behalf of Respondent before Circuit Judge Morgan and District Judges Edenfield and Hooper, wherein it was held, in part, that the action proposed to be taken by the United States Attorney under color of enforcing *39 U.S.C. § § 4006 and 4007,* was unconstitutional as a prohibited prior restraint and for not setting forth procedural safeguards, as was required by the United States Supreme Court in the case styled *Freedman v. Maryland,* 380 U.S. 51 (1965).

5. In the case of *Mitchum v. Foster, supra,* decided by the United States Supreme Court June 19, 1972, the question there involved was the jurisdiction of the Federal Court to intervene in a State Court civil proceeding which commenced prior to the institution of the Federal action. In that factual situation, a State Judge had ordered an adult bookstore closed and enjoined the proprietors thereof from offering for sale any king of press materials. A Three-Judge statutory court held that the anti-injunction statute, *28 U.S.C.* § 2283 was a bar to injunctive relief in that case, and the proprietors of the bookstore appealed to the United States Supreme Court. Probable Jurisdiction was noted. The case was argued in December 1971 and the Court, in an opinion by Justice Stewart expressing the unanimous view of the Court, held that *Section 1983* constituted an "expressly authorized" exception to Section 2283 and that *Section 2283* did not preclude injunctive relief in the nuisance case before it involving the prior restraint.

6. On June 26, 1972, the United States Supreme Court granted *certiorari* in the case of *Paris Adult Theatre v. Slaton,* No. 71-1051, along with two other cases, *Alexander v. Virginia,* No. 71-1315, and *Kaplan v. California,* No. 71-1422. At issue in the *Paris Adult Theatre* case were the following questions:

1. "Whether the two motion picture films which are the subject matter of these proceedings, and determined by the Trial Court to be not obscene, but by the Supreme Court of the State of Georgia to be obscene, are not obscene in the constitutional sense and are protected expression under the *First* and *Fourteenth Amendment* to the *United States Constituiton?*"

2. "Whether there can be a constitutionally valid judicial determination of obscenity as to each of the films brought before the Supreme Court, consistent with Petitioners' rights to procedural and substantive due

process required by the *Fifth* and *Fourteenth Amendments* to the *Constituion of the United States,* in the absence of any affirmative evidence on each of the constitutionally relevant elements of the standards for judging proscribable obscenity under the *First Amendment*?"

3. "Whether the State of Georgia may, consistent with the *First, Fourth, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States,* utilize *ad hoc* procedures to enjoin dissemination of presumptively protected *First Amendment* materials where there is no statutory or authoritative judicial decision authorizing the same with appropriate procedural safeguards?"

A copy of the Petition for Certiorari in the *Paris Adult Theatre* case is attached hereto as Exhibit No. 1 in support of this Affidavit, and a copy of the letter from the Clerk's Office of the United States Supreme Court notifying counsel of the grantin g of the certiorari and of the request of the Court to brief and argue an additional question

4. "Whether the display of any sexually oriented films in a commercial theatre, when surrounded by notice to the public of their nature and by reasonably protection against exposure of the film to juveniles is constitutionally protected?"

is attached hereto as Exhibit No. 2 in support of this Affidavit. The Petitioners' Brief in the *Paris Adult Theatre* matter, due in the United States Supreme Court on August 25, 1972, is attached hereto as Exhibit No. 3 in support of this Affidavit.

7. Some of the very issues which Defendants seek to raise in the so-called nuisance action are well-known to them to be now before the United States Supreme Court.

8. In the Complaint filed by Defendants herein (which is attached as Exhibit "A" to Plaintiffs' Complaint in the within proceedings), it is alleged that the press materials offered for sale at the Harem Book Store consist of:

> "books, magazines and motion picture films, each and all of which contain photographs, still or moving, of one or more of the following:
>
> a) acts of sexual intercourse, real and simulated;
>
> b) acts of anal intercourse, real and simulated;
>
> c) acts of cunnilingus, real and simulated;
>
> d) acts of fellatio, real and simulated;
>
> e) acts of other sexual activity, including but not limited to photographs of persons fondling female breats, and persons fondling the genitals of themselves and of others, both men and women."

Contrary to the verification affidavit filed by Joel M. Feldman as one of the attorneys for the Defendants, the United States Supreme Court has held that the various classifications of materials, represented by the designation of Mr. Feldman, not to be obscene in the constitutional sense and a schedule of cases representing the description of materials held not to obscene by the United States Supreme Court is attached hereto as Exhibit No. 4 in support of this Affidavit.

9. The United States Supreme Court has a matter now pending before it involving the use of a nuisance law to stop the showing of a film in the case of *Grove Press, Inc. v. Flask*, No. 70-2, which is an appeal from a statutory Three-Judge Court, docketed July 6, 1970. This case involves, in part, a concept of public nuisance, and it is the second oldest case on the docket of the Court, which is, as of this date, still undisposed of. 41 LW 3005.

10. In the recent case of *Rabe v. Washington*, 405 U.S. 313 (1972), Mr. Justice Burger, in a separate opinion joined in by Mr. Justice Rehnquist concurring with the other seven members of the Court, stated as follows with regard to the issue of nuisance:

> "Public display of explicit materials such as are described in this record are not significantly different from any noxious public nuisance traditionally within the power of the States to regulate and prohibit, and, in my view involve no signficant countervailing *First Amendment* considerations."

It is interesting to note that only one member of the Court other than the Chief Justice joined in this concept with regard to noxious public nuisance. To put Mr. Justice Burger's concept of public nuisance in focus, it should be noted that the public displays implicated in the factual situation before the Court in *Rabe v. Washington, supra*, included the following elements: (1) the screen of the outdoor drive-in theatre was clearly visible to all motorists passing over a nearby public highway; (2) there were twelve to fifteen nearby family residences which were confronted with a view of the screen from their premises; and (3) young children were often observed viewing sexually-oriented films on the screen of the outdoor theatre from outside the chainlink fence surrounding the theatre grounds. It was to this factual context, and this context only, that Justice Burger addressed his remarks.

Mr. Feldman's affidavit and the complaint to which it is attached would have us believe that the identification of a bookstore selling press materials to interested adults where the outside of the store contains forewarning to adults of the character of the material offered therein is, in effect, an exploitation to a prurient interest of adult materials, when, in truth and in fact, the forewarning and prohibition of juveniles of entering the store is a good faith effort on the part of Plaintiffs herein to follow the guidelines set down by the United States Supreme Court in *Redrup v. New York,* 386 U.S. 767, and its thirty-four progeny cases which have been decided since that time.

See also, *Alexander v. Virginia,* No. 71-1315, wherein The United States Supreme Court, in addition to the questions presented in the Petition for Certiorari, directed counsel to brief and argue the following:

> "Whether the display of any sexually-oriented pictorial magazines for commercial sale, when surrounded by notice to the public of their nature and by reasonably protection against exposure of the magazines to juveniles, is constitutionally protected?"

The United States Supreme Court, in *Kaplan v. California,* No. 71-1422, granted certiorari on June 26, 1972, and one of the questions presented was as follows:

> "Whether California Penal Code §§ 311 and 311.2, as construed and applied to authorize the judgment of conviction of petitioner herein, where the sole evidence in the record establishes that petitioner, a retail book seller, sold the book to an adult who requested the book and purchased it, ostensibly for his personal use, and where the prosecution neither sold the material in his book store to minors nor thrust it upon the general public and engaged in no 'pandering' of ther material, deprive petitioner of his

liberty and property without due process of law and abridge petitioner's exercise of freedoms of speech and press, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments?"

11. In the proceedings at bar, the record establishes conclusively that the press materials offered for sale at the Harem Book Store, to interested adults only, and surrounded by notice to the public of their nature and by reasonable protection against exposure of the press materials to juveniles, would be constitutionally protected. The United States Supreme Court, by raising these questions on its own motion has demonstrated that the question first hinted at in *Stanley v. Georgia,* 394 U.S. 567, and not resolved by *United States v. Reidel,* 402 U.S. 351 (1971) and *United States v. Thirty-Seven Photographs,* 402 U.S. 363 (1971), is a very substantial one.

12. The *ad hoc* procedural devices being utilized by Defendants herein, as well as the substance of the relief which they seek in the State Court, under color of enforcement of the State of Georgia Obscenity and Nuisance statutes, as set forth in the Complaint to which this Affidavit is attached, clearly presents a proper question for adjudication by this Court, and the institution of the proceedings in the State Court in view of the factual background set forth, represents bad faith enforcement of the law, designed to harass the Harem Book Store out of business during this election year.

/s/ Robert Eugene Smith, Esquire

SWORN TO AND SUBSCRIBED before me, this 28th day of August, 1972.

/s/ C.L. Stovall
Notary Public, Georgia State at Large
My Commission Expires Sept. 15, 1975.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALVIS G. SPEIGHT t/a
HAREM BOOK STORE and
JAMES L. CHANDLER,
Plaintiffs

v. CIVIL ACTION NO. 17,075

LEWIS R. SLATON, District
Attorney, Atlanta Judicial
Circuit; and HINSON MCAULIFFE,
Solicitor General, Criminal
Court of Fulton County, Georgia,
Respondents

ANSWER
(Filed September 13, 1972)

Comes now LEWIS R. SLATON, District Attorney of the Atlanta Judicial Circuit, and HINSON MCAULIFFE, Solicitor General of the Criminal Court of Fulton County, Georgia, Respondents named herein, and file their answer, without waiving any other right available to them.

FIRST DEFENSE OF LAW

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE OF LAW

Since the Petitioners are seeking merely to enforce an alleged "private right" this court should decline, under comity, to intervene in an action already commenced in a state court of competent jurisdiction in which any claimed right of the Petitioner can be fully considered and protected;

THIRD DEFENSE OF LAW

Since the Petitioners have made a constitutional attack on a new state statute, which statute has not yet been considered by the state courts, this court should abstain from considering the case until the state courts have had an opportunity to consider the same.

FOURTH DEFENSE OF LAW

This court is without jurisdiction to consider the complaint for the following reasons to wit:

a) The action does not involve any deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage of any right, privilege or immunity secured by the United States Constitution and the laws within the meaning of 28 U.S.C. Sec. 1343(3), or 42 U.S.C. Sec. 1983.

b) This action does not involve any deprivation of civil rights under which petitioners would be entitled to recover damages, or to secure equitable or other relief under any act of congress or the United States Constititution, within the meaning of 28 U.S.C. Sec. 1343(4).

FIRST DEFENSE OF FACT

A. Answering Part I, Jurisdiction of the Petition, to wit:

1.

The first three paragraphs (1, 2, 3) require no answer. While paragraph four requires no specific answer, in *Gable v. Jenkins,* 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595 (1970) the Supreme Court summarily affirmed an unreported

decision of a three-judge U.S. District Court of the Northern District of Georgia (_____ F. Supp. _____ (No. 13001, Oct. 1969)) recognizing Georgia's authority to formulate procedures whereby adversary proceedings for the seizure of obscene materials might be had, even where no statutory procedure therefore existed. See also, *Johnny Rebs et al v. Slaton,* 401 U.S. 985, 91 S. Ct. 1220 (1971) affirming 309 F. Supp. 998 (1970). Furthermore, the procedure attempting to be utilized by the Respondents will accomplish the purpose of affording the Petitioner's any adversary hearing to which they may be entitled. See also, *U.S. v. Reidel,* 91 S. Ct. 1410, 1412 (1971).

2.

The first two subparagraphs of paragraph 5 are denied. Subparagraphs 3, 4 and 5 of said paragraph require no answer. For want of knowledge sufficient to form a belief Respondents can neither admit nor deny the last subparagraph of said paragraph; and Respondents demand strict proof thereof.

B. Answering Part II, Parties:

1.

Respondent is without sufficient information to form a belief as to whether or not Alvis G. Speight operates the Harem Book Store, particularly, as alleged in the first subparagraph of paragraph 6, since the application for business license for said business filed with the city of Atlanta listed James L. Chandler as the owner of said business. Further answering said subparagraph Respondents deny that either Petitioner Speight or Petitioner Chandler are engaged in the sale or offering for sale of books, magazines, newspapers, movie films, pictures or other press materials protected by the First Amendment to the United States Constitution, but rather that both Speight (if he is the operator of said

business) and Chandler are engaged in the sale, offering for sale and exhibition for sale of hard core pornography; and that any items sold, offered for sale, or exhibited for sale not constituting hard core pornography are sold, offered for sale, or exhibited for sale co-mingled with the heretofore-mentioned items of hard core pornography, with no distinction made by petitioners between the two classifications, if indeed there be items other than hard core pornography involved; and that since said items constitute hard core pornography they are outside of the protection offered by the First Amendment to the United States Constitution.

Further answering said paragraph 6, Respondents deny the second subparagraph thereof; and are without information sufficient to form a belief as to whether or not such sales or offerings are made by Petitioners to persons under the age of eighteen years, are pandered, or whether or not such materials are offered for sale in a way impermissibly intruding upon and into the privacy of unwilling adults wishing to avoid confrontation therewith as alleged in the second subparagraph of paragraph 6. Further answering said subparagraph, Respondents aver that said bookstore is located in a commercial section of the city of Atlanta between private residences and Therrell High School, a public school in the city of Atlanta having minor students; and that said minor students cannot help but be subjected to the display of said materials to and from their homes and school.

Further answering said paragraph, and the last subparagraph thereof, Respondent is without information sufficient to form a belief as to the allegations contained in said sub-paragraph.

2.

Answering Paragraph 7, Respondents are without information sufficient to form a belief as to the allegations

since the application for a business license for Harm Book Store filed with the city of Atlanta lists James L. Chandler as the owner of said business.

3.

Paragraphs 8 and 9 are admitted. Paragraph 10 requires no answer.

C. Answering Part III, Factual Allegations,

1.

Paragraphs 11, 12, 16, 17, 18, 19 are denied as alleged. Paragraph 15 is admitted. For lack of knowledge sufficient to form a belief Respondents can neither admit nor deny the allegations of paragraph 13. That portion of paragraph 14 comprising the first sentence and the first clause of the second sentence ending with the words "constitutional sense" are admitted. The balance of said paragraph requires no answer although Respondents deny that such materials are not obscene, but rather Respondents aver that such materials are obscene.

2.

Further answering said paragraphs Respondents admit instituting a suit against certain of the Petitioners, as set out in paragraph 16, that the same was done in good faith; and that the material quoted in said paragraph is substantially correct.

3.

Further answering paragraph 17, Respondents admit that Hon. Claude D. Shaw signed the order in question, but deny that said order is repugnant to the United States Constitution.

D. Answering Part IV, Bases in Law for Relief:

1.

Paragraphs 22, 23, 24, 25, 26, 27 and all of their subparagraphs are denied.

E. Answering Part V, Relief Sought:

1.

Paragraphs 28 and 29 are denied.

SECOND DEFENSE OF FACT

The allegations contained in Fulton County Complaint No. B-77630, attached to the Petition as Exhibit "A" thereof, are adopted as Respondent's second defense of fact, and incorporated by reference herein.

WHEREFORE having fully answered said complaint Respondents pray:

1) That this answer be inquired into;

2) That this court dismiss the complaint;

3) That in the alternative this court

a) Exercise the doctrine of comity, and allow the State Court proceeding to continue; or

b) Exercise the doctrine of abstension, and allow the State Court proceeding to continue;

4) That this court grant to the Respondents such other and further relief as is authorized in law and equity.

JOEL M. FELDMAN
Assistant District Attorney

CARTER GOODE
Assistant District Attorney

TOM MORAN, JR.
Assistant Solicitor General

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Joel M. Feldman, hereby certify that I have this day served a copy of the foregoing Answer upon the following attorneys at their post office addresses of record, Mr. Freeman Hutton, Suite 2005, 1175 Peachtree, N.E., Atlanta, Georgia 30309; Mr. R.E. Smith, Suite 507, 102 W. Pennsylvania Avenue, Towson, Maryland, 21204; Mr. G. Deitch, Suite 2005, 102 W. Pennsylvania Avenue, Towson, Maryland, 21204; Mr. G. Deitch, Suite 2005, 1175 Peachtree, N.E., Atlanta, Georgia 30309.

This 11 day of September 1972.

JOEL M. FELDMAN
Of Counsel for Respondents.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALVIN G. SPEIGHT t/a
HAREM BOOK STORE, and
JAMES L. CHANDLER,
Petitioners

vs. CIVIL ACTION NO. 17075

LEWIS R. SLATON, District
Attorney of the Atlanta
Judicial Circuit, and
HINSON MCAULIFFE, Solicitor
General of the Criminal Court
of Fulton County, Georgia,
Respondents.

PROPOSED STIPULATIONS OF FACT AND CONCLUSIONS OF LAW

Comes now LEWIS R. SLATON and HINSON MCAULIFFE, Respondents named herein and, in accordance with this Court's instructions, submit their proposed stipulations of fact and conclusions of law; and, which proposed stipulations of fact and conclusions of law are being simultaneously submitted to counsel for the Petitioners. Respondents, however, do not believe that counsel for the Petitioners and counsel for the Respondents will be able to reach any agreement as to any such stipulations of fact and conclusions of law, and Respondents, therefore respectfully request that this Court enter an order directing the Petitioners to furnish to the Court at least by December 21, 1972, four copies of each of the publications named in the original petition filed by the Respondents in the Superior Court of Fulton County, Georgia, in case number B-77630, paragraphs 9, 10, 11, and 12. Respondents make this request since the only copies of said publications possessed by Respondents were tendered to Fulton Superior Court Judge Claude Shaw at the time the petition was filed by Respondents with said Judge.

A. *Proposed Findings of Facts*

1. At all material times a business known as the Harem Book Store was and is located and being carried on at the premises known as 2979 Campbellton Road, S.W., Atlanta, Fulton County, Georgia; this location is in a commercial section of the City of Atlanta on a main thoroughfare between private residences and Therrell High School, a public school of the City of Atlanta, having students of ages between 13 and 18 years which students cannot help but be exposed to advertising and display of hard-core pornographic materials at said premises.

2. On July 9, 1971 plaintiff James L. Chandler made an application to the business license division of the City of Atlanta for a business known as the Harem Book Store, located at 2979 Campbellton Road, S.W., Atlanta, Georgia.

3. On said application made under oath said Chandler claimed himself as the sole owner of said business.

4. As of August 21, 1972, there had been no change in the information contained in the said application, that is, that no application has ever been filed with the City of Atlanta business license division requesting that Alvis G. Speight be shown as the owner of said business, rather than James L. Chandler, nor had said Speight applied for a license for a business to be operated on the same premises.

5. Said business is exclusively engaged in the retail sale of books, magazines and motion picture films dealing with matters of a sexual nature, and of mechanical devices relating to the act of sexual intercourse (which mechanical devices include; but are not limited to, artificial vaginas and artificial penises).

6. Said business has a large turnover of retail sales clerks.

7. (a) On July 28, 1971 at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

1. Sex in Marriage, The Photo Magazine of Marital S Education, Volume One, Number Two, $6.00, Academy Magazines Division of Academy Press, publisher.

2. Primer of Sexual Education, Volume Three, $6.00, Calga Publishers.

3. The Sexual Man, Collector's First Edition, Vol. 1, $6.00, SECS Press.

(b) On August 14, 1971, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

4. Cavewomen, A.P.E.C. Magazine No. 25, $3.50, Publisher's Export Company, Inc.

5. The Savages, A.P.E.C. Magazine No. 14, $3.50 Publisher's Export Company, Inc.

6. Foreplay, A Sensuous New Erotic Probe into the World of Sex, $6.00.

(c) On November 24, 1971, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazine to an adult member of the general public, to wit:

7. AWARE, Volume One, Number Two, $6.00.

(d) On May 31, 1972, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

8. More Than 7 Inches, No. 2, $6.00.

9. Gay Sex Guide, Volume 1, $6.00.

10. Affaire, No. 7, $7.50.

11. Love Theme, Vol. 1, No. 4, $4.50.

12. The Special, No. 5, $5.00, Pnd.

13. Affaire, No. 9, $6.00.

8. That the magazines numbered 1,2,3,5,6, and 7 contain one or more photographs of the act of coitus.

9. That the magazines numbered 4, 6, and 11 contain one or more photographs of either actual or simulated coitus, and are intended to convey to the viewer of same the impression that an act of coitus is being photographed.

10. That the magazines numbered 3, 5, and 9 contain one or more photographs of the act of pederasty (penetration per anus).

11. That the magazines numbered 8, 9, 10, 11 and 13 contain one or more photographs of either actual or simulated pederasty; and are intended to convey to the viewer of the same the impression that an act of pederasty is being photographed.

12. That the magazines numbered 1, 2, 3, 4, 5, 6, and 7 contain one or more photographs of a man performing cunnilingus upon a woman; and that magazines numbered 1, 2, 3, 5, 6, and 11 contain one or more photographs of a woman performing cunnilingus upon another woman.

13. That the magazines numbered 1, 2, 3, 4, 6, 7, 11 and 12 contain one or more photographs of either actual or simulated cunnilingus performed by a man, and are intended to convey to the viewer of same the impression that an act of cunnilingus is being photographed; and that the magazines 2, 3, 6 and 12 contain one or more photographs of either actual or simulated cunnilingus perfomed by a woman upon another woman, and are intended to convey to the viewer of same the impression that an act of cunnilingus is being photographed.

14. That the magazines numbered 2, 3, and 9 contain one or more photographs of a man performing fellatio upon another man; and that the magazines numbered 1, 2, 3, 6 and 7 contain one or more photographs of a woman performing fellatio upon a man.

15. That the magazines numbered 3, 5, 9, 10 and 13 contain one or more photographs of either actual or simulated fellatio performed by a man upon another man, and are intended to convey to the viewer of same the impression that an act of fellatio is being photographed; and that the magazines numbered 2, 3, 6 and 12 contain one or more photographs of either actual or simulated fellatio performed by a woman upon a man, and are intended to convey to the viewer of same the impression that an act of fellatio is being photographed.

16. That the magazines numbered 1, 2, 3, 4, 6, 7, 11, and 12 contain one or more photographs of a man fondling a woman's breast; and that the magazines numbered 3, 4, 6, and 11 contain one or more photographs of a woman fondling another woman's breast.

17. That the magazines numbered 1, 2, 3, 4, 5,6, 7, 11 and 12 contain one or more photographs of a man fondling a woman's genitals; and that the magazines numbered 2, 3, 4, and 6 contain one or more photographs of a woman fondling another woman's genitals.

18. That the magazines numbered 3, 8, 9, 10 and 13 contain one or more photographs of a man fondling another man's genitals; and that the magazines numbered 1, 2, 3, 5, 7, 11, and 12 contain one or more photographs of a woman fondling a man's genitals.

19. That the magazines numbered 6, 7, and 11 contain one or more photographs of a woman fondling her own breasts; that the magazines numbered 1, 2, 3, 6 and 7 contain one or more photographs of a woman fondling her own genitals; and that the magazines numbered 3, 8, 9 and 10 contain one or more photographs of a man fondling his own genitals.

20. That the magazine numbered 2 contains one or more photographs of a woman fondling another person's anus.

21. That the magazines numbered 1, 2, and 3 contain one or more photographs of an artificial penis being used upon a woman.

22. That the magazines numbered 1, 2, 3, 6, 7, 8 and 9 contain one or more photographs of a penis in the act of ejaculation.

23. That the magazine numbered 9 contains one or more photographs of a man urinating upon another man.

24. That the magazines numbered 1, 2, 3, 5, 6, 7, 8, 9, 11, and 13 contain at least some text, while magazines numbered 4, 10 and 12 contain no text.

25. That the magazines numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 are obscene, hard-core pornography as a matter of fact.

26. That the Petitioner knew what was contained in each of the aforesaid magazines, as well as what was contained in each magazine, book and motion picture film offered for and displayed for sale at said premises, and sold by Petitioners, their agents and employees at said premises.

27. Said premises and business have been used, are now being used, and, unless prevented by judicial action, will continue to be used for the advertising, storage, sale and exhibition for sale of materials obscene within the meaning of Section 26-2101 of the Criminal Code of Georgia. Said activities are being conducted by the aforesaid Chandler, and by various agents, servants and employees of the aforesaid Chandler whose names and addresses are not alleged because of the rapid rate of change or turnover in such personnel.

28. In addition to the magazines specifically described above, the materials advertised for sale, exhibited for sale and sold at said premises consist of books, magazines, and motion picture films, each and all of which contain photographs, still or moving, of one or more of the following:

a) acts of sexual intercourse, real and simulated;

b) acts of anal intercourse, real and simulated;

c) acts of cunnilingus, real and simulated;

d) acts of fellatio, real and simulated;

e) acts of other sexual activitity, including but not limited to photographs of persons fondling female breasts, and persons fondling the genitals of themselves and of others, both men and women.

29. The signs on the exterior of the building on said premises housing the Harem Book Store, which is located on

a main thoroughfare in the City of Atlanta, are designed and calculated to convey to adult male viewers the message that the material for sale within is of a salacious and prurient nature.

30. Within said building in said place of business there are stored, sold and exhibited for sale imitations of large erect penises and other phallic objects, in immediate juxtaposition to books, magazines and motion picture films of the nature set forth in this complaint. A suggestively garbed female dummy with vagina exposed also occupies a prominent position in said building.

31. That the business of the Harem Book Store is the commercial exploitation of erotica solely for the sake of their prurient appeal.

32. That the books, magazines, and motion picture films as being advertised, stored, sold and exhibited for sale are commingled and not segregated by categories having regard for such as is within and such as is without the protection of the First Amendment of the Constitution of the United States and Art. 1, Sec. 1, Par. 15 of the Georgia Constitution (Code Ann., Sec. 2-115). Said books, magazines and motion picture films and said imitation penises and phallic objects constitute one stock of merchandise all of which is pandered as being in the nature of hard-core pornography and the major portion or a substantial portion of such stock of merchandise is such hard-core pornogrpahy, and plaintiffs say that the entire stock of merchandise is accordingly subject to condemnation and forfeiture.

33. That the photograph attached to the Petition filed by Respondents in Case No. B-77630, therein as Plaintiff's Exhibit "A", truly and accurately represent the exterior signs, interior displays of the aforesaid materials, imitation penises and the female dummy referred above.

34. That the New Amendment to the Georgia obscenity law (Ga. Code Chapter 26-21), adopted by the General Assembly of Georgia in 1971 as Georgia Code Section 26-2103 et seq. (Georgia Laws 1971, p. 344, which sections provide that any premises used in violation of any provision of the said chapter constitutes a public nuisance, has not yet been considered by any Georgia Court of Original Jurisdiction, nor has the same been construed or interpreted by any Georgia Court of Appellate Jurisdiction.

B. *Proposed Conclusions of Law*

1. The Georgia obscenity laws (Code Sections 26-2101 et seq.), at least as they related to this case, are constitutional. *Gable v. Jenkins,* 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595 (1970), affirming 309 F. Supp. 998 (N.D. Ga., Oct., 1969; *Gornto v. Georgia,* 227 Ga. 46 (1970), Cert. Den. 402 U.S. 933 (1971), see also 336 F. Supp. 1372 (1972).

2. The state is not limited in controlling obscene materials to criminal prosecutions. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1956).

3. In addition to criminal prosecutions the State may also utilize injunctive procedures to control obscenity. *Kingsley Books, Inc. v. Brown* Id @ 441; *Freedman v. Maryland,* 380 U.S. 51, 60 (1960); *Grove Press, Inc. v. City of Philadelphia,* 418 F.2d 82 (3rd Cir., 1962).

4. Obsenity is not protected by the First Amendment to the United States Constitution. *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (19).

5. Although a person is entitled to be free from governmental interference within the confines of his home as to his choice of reading material, including obscene materials (*Stanley v. Georgia,* 394 U.S. 577, 89 S.Ct.

1243, 22 L.Ed.2d 542 (1968)) this privilege grants no right to such a person to receive obscene materials, or for others to furnish such a willing adult with such materials *United States v. Reidel,* 402 U.S. 351, 356, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971); *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 91 S.Ct. 1400, ___ L.Ed.2d ___ (1971).

6. There is no recognized constitutional right to commercially destribute obscenity to anyone. *United States v. Reidel, supra; United States v. Thirty-Seven Photographs, supra; Milky Way Productions, Inc. v. Leary,* 305 F. Supp. 288, Aff'd. 397 U.S. 98, 90 S.Ct. 817, ____ L.Ed.2d ____ (1970); *G.I. Distributors, Inc. v. New York,* 20 N.Y.2d 104, 281 NYS 2d 795, cert. den. 389 U.S. 905, 88 S.Ct. 218, ____ L.Ed.2d ____ (1967).

7. Where the issue of whether or not a particular item is obscene (as opposed to hard-core pornography) the State is entitled to treat and consider the material as obscene if the distributor thereof treated and considered the material as such for any purpose. *Ginzburg v. United States,* 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966).

8. The thirteen (13) magazines described in "A" above are obscene as a matter of law, the same being hard-core pornography as that term is defined in *Ginzburg v. United States, Id.* at 463, FN 3.; *United States v. Wild,* 422 F.2d 34, (2nd Cir., 1969) cert. den. _____ U.S. _____ (9 Cr. L. 4046, 1971).

9. The civil rights act (28 U.S.C. Section 1343 (3)(4) under which Petitioners bring their action recognize a distinction between mere "private" rights as opposed to "transcendent public" rights; that injunctive and declaratory relief is generally unavailable to enforce a mere "private" right; and that the "rights" Petitioners seek to enforce fall into the category of "private" rights.

Johnny Reb's Book and Card Shop, et al. v. Slaton, 309 F. Supp. 998 (1970), aff'd. 401 U.S. 985, 91 S.Ct. 1220, _____ L.Ed.2d _____ (1971); *Machesky v. Bizzell,* 414 F.2d 283 (5th Cir., 1969); *Gable v. Jenkins, supra.*

10. The Georgia procedure authorizing injunctions against public nuisances (Ga. Code Chapter 72-2 et. esq., Section 72-201, 72-202) is not unconstitutional. *Kingsley Books, Inc. v. Brown, supra.* See also Section 65, Georgia Civil Practice Act (Ga. Laws 1966, pp. 609, as amended); *Evans Theatre Corporation v. Slaton,* 227 Ga. 377, 382 (3) (1971), cert. den. Nov. 9, 1971, _____ U.S. _____ (40 L.W. 3210).

11. It is appropriate for a three-judge federal court to abstain from considering a new state statute when that state's courts have not yet had an opportunity to consider and construe the statute. *Johnny Reb's Book and Card Shop, et al v. Slaton, supra; Mitcham v. Foster,* _____ U.S. _____ (40 L.W. 4737, 6/19/72); *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, _____ L.Ed.2d _____ (1971); *Samuels v. Mackell,* _____U.S. _____, 91 S.Ct. 769, _____ L.Ed.2d _____ (1971); *Byrne et al v. Karalexis,* _____ U.S. _____, 91 S.Ct. 771, _____ L.Ed.2d _____ (1971); *Perez v. Ledesma,* ____ U.S. ____, 91 S.Ct. 674, ____ L.Ed.2d ____ (1971).

Respectfully submitted,

/s/ LEWIS R. SLATON
District Attorney, A.J.C.

/s/ HINSON MCAULIFFE
Solicitor General, A.J.C.

/s/ JOEL M. FELDMAN
Assistant District Attorney

/s/ CARTER GOODE
Assistant District Attorney

Counsel for Respondents

CERTIFICATE OF SERVICE

I, Joel M. Feldman, hereby certify that I am of counsel for Respondents in the above styled case and that I have this day served a copy of the foregoing upon Mr. D. Freeman Hutton, Mr. Gilbert H. Deitch, and Mr. Robert Eugene Smith by U.S. Mail at their respective post office addresses of record, Suite 2005, 1175 Peachtree Street, N.E., Atlanta, Georgia 30309.

This 27 day of November, 1972.

/s/ JOEL M. FELDMAN
Assistant District Attorney.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALVIS G. SPEIGHT t/a
HAREM BOOK STORE, and
JAMES L. CHANDLER,
Petitioners,
versus CIVIL ACTION NO. 17075
LEWIS R. SLATON, DISTRICT
ATTORNEY OF THE ATLANTA
JUDICIAL CIRCUIT, and
HINSON McAULIFFE, SOLICITOR
GENERAL OF THE CRIMINAL COURT
OF FULTON COUNTY, GEORGIA,
Respondents.

PROPOSED STIPULATIONS OF FACT
AND CONCLUSIONS OF LAW

Come now Petitioners, by and through their attorneys at law, and, in accordance with this Court's instructions, submit their proposed stipulations of fact and conclusions of law to the Court and to Respondents.

A. *PROPOSED FINDINGS OF FACT*

1. At all times material hereunto Petitioner Speight or Petitioner Chandler, trading as the Harem Book Store, located at 2979 Campbellton Road, S.W., Atlanta, Georgia, have been engaged, through agents, servants, and employees, in the sale and offering for sale of books, magazines, newspapers, movie films, pictures, and other press materials which are presumptively protected under the *First Amendment* to the *Constitution of the United States*, pursuant to applicable City of Atlanta business licenses.

2. The press materials offered for sale by the Harem Book Store are comparable to those declared not to be obscene by

the Supreme Court of the United States, and many other inferior Federal Courts, as well as various state appellate courts and, hence, are protected expression under the *First Amendment* to the *Constitution of the United States*, as made applicable to the States under the *Fourteenth Amendment*.

3. No sales or offerings are made by the Harem Book Store to persons under eighteen years of age (minors) of any of the sexually-oriented press materials distributed or offered for distribution by the Harem Book Store, nor are they "pandered" in the *Ginzburg*-sense (*Ginzburg v. U.S.A.*, 383 U.S. 463 [1966]), nor are the press materials sold or offered for sale in a way that intrudes impermissibly into the privacy of an unwilling adult who wishes to avoid confrontation therewith.

4. Prior to July 1, 1972, when the legal age of majority in the State of Georgia was lowered to eighteen (18) years of age from twenty-one (21) years of age, the agents, servants and employees of the Harem Book Store made no sales or offerings to persons under the age of twenty-one (21).

5. The use of the premises at 1979 Campbellton Road, S.W., Atlanta, Georgia, as a bookstore is consistent with the approved usages for property zoned, as it is, in the "C-2" classification.

6. At all times material hereunto, the Harem Book Store has been conducted without any overt breaches of the peace or other interference with the rights of others passing by said premises.

7. On four occasions since the Harem Book Store opened more than one year ago, agents of the Defendant McAuliffe have purchased a total of thirteen (13) magazines which Defendants contend are obscene. None of said magazines has ever been declared to be obscene in the constitutional sense.

8. No person, employee or otherwise, has ever been convicted of the commission of a statutory offense at the premises occupied by the Harem Book Store, including the offense of distributing so-called obscene materials in violation of *Georgia Code* § *26-2101.*

9. Defendants have instituted a civil suit in the Superior Court of Fulton County, Georgia, in bad faith, for the purpose of harassing Plaintiffs, as their interests may appear, and effecting irreparable harm, demanding, *inter alia,*

(a) "... . injunctions, both temporary and permanent, against the conduct and operation of the Harem Book Store, in and on the premises at No. 2979 Campbellton Road, S.W., in the City of Atlanta, Fulton County, Georgia, by any person;" and,

(b) "... an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed;" and

(c) "that a Rule Nisi be issued instanter requiring the defendants named herein (plaintiffs in this action) to show cause why the prayers of this complaint should not be granted."

10. Defendants knew or should have known that no violation of Georgia statutes, to-wit: *Georgia Code* § *26-2101,* has been alleged and proved in any court of law against Plaintiffs herein, or any of their agents, servants, and employees, relating to the Harem Book Store located at 2979 Campbellton Road, S.W., Atlanta, Fulton County, Georgia, prior to the institution of the Complaint.

11. The resort to utilization of the concept or public nuisance authorized by Georgia Statutes by the Defendants in order to shut down the Harem Book Store and forbid press materials to be sold there as well as seeking the forfeiture and

destruction of all the press materials contemporaneously being offered for sale at said store is without regard to whether or not each and every single publication can be said to be obscene in the constitutional sense, and indeed, the said Complaint, as sanctified by verification, states, in part, as follows:

> "Said books, magazines and motion picture films and said imitation penises and phallic objects constitute one stock of merchandise all of which is pandered as being in the nature of hard-core pornography and the major portion or a substantial portion of such stock of merchandise is such hard-core pornography, and plaintiffs say that the entire stock of merchandise is accordingly subject to condemnational and forfeiture." (Exhibit "A", p. 3.)

Further, Defendants also, by their proceedings in enforcement of said Georgia Statutes, attempt to circumvent the safeguards of the criminal process with its requirement of proof beyond a reasonable doubt before a jury and substitute therefore a lesser, civil, burden of proof, to-wit: the preponderance of the evidence standard, and a judge.

12. Said attempt is a bad faith effort to force the cessation of sales of all materials in the said store without regard to whether constitutionally protected.

B. *PROPOSED CONCLUSIONS OF LAW*

1. The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important

l that the standards for judging
ection of freedom of speech and
oes not treat sex in a manner
. *Roth v. U.S.*, 354 U.S. 476, 488

eech unconditionally guaranteed
imately be regulated, suppressed,
The separation of legitimate from
ensitive tolls. *Speiser v. Randall*,
2 L.Ed.2d 1460; *Blount v. Rizzi*,
27 L.Ed.2d 498 (1971).

n Amendment a state is not free
ure it pleases for dealing with
the possible consequences for
ech. *Marcus v. Search Warrant of*
1 S.Ct. 1708, 6 L.Ed.2d 1127

restraint of expression bears a
s constitutional validity. *Bantam*
58, 83 S.Ct. 631, 9 L.Ed.2d 584;
. 697, 51 S.Ct. 625, 75 L.Ed.
v. United States, 403 U.S. 713,
822 (1971); *Organization for a*
U.S. 415, 91 S.Ct. 1575, 29

eorgia Code § 26-2101 (Ga.2.
1971, p. 344) are repugnant to
endments to the *Constitution of*
y are overbroad in that they do
aterials which are sold without
ir nature or without reasonable
of the materials to juveniles. Cf.
Paris Adult Theater v. Slaton, No. 71-1051 and *Alexander v. Virginia*, No. 71-1315, arguments heard in the United States Supreme Court, October 19, 1972.

interests. It is therefore vital
obscenity safeguard the prote
press for material which do
appealing to prurient interest.
(1957).

2. The line between spe
and speech which may legiti
or punished is finely drawn. T
illegitimate speech calls for s
357 U.S. 513, 78 S.Ct. 132,
400 U.S. 410, 91 S.Ct. 423, 2

3. Under the Fourteenth
to adopt whatever procedu
obscenity without regard to
constitutionally protected spe
Property, 367 U.S. 717, 8
(1961).

4. Any system of prior
heavy presumption against its
Books v. Sullivan, 372 U.S. 5
Near v. Minnesota, 283 U.S
1357; *New York Times Co.*
91 S.Ct. 2140, 29 L.Ed.2d
Better Austin v. Keefe, 402
L.Ed.2d 1 (1971).

5. The provisions of G
1968, pp. 1249, 1302, Ga. L
the *First* and *Fourteenth Am*
the United States because the
not limit prosecutions to m
notice to the public of their
protection against exposure

6. The provisions of Ga. Code § 26-2101 G) (Ga. L. 1968, pp. 1249, 1302) are repugnant to the *First, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* because they contain an irrational and arbitrary presumption of the type condemned by the United States Supreme Court in *Leary v. U.S.*, 395 U.S. 6 (1969) becuase it cannot logically be said that the presumed fact, obscenity, is "more likely than not" to flow from the proven fact, commercial exploitation of erotica solely for the sake of its prurient appeal; furthermore, said statutory presumption is further invalid because it denies due process of law and equal protection of the law in that it permits a conviction upon a standard less than that of beyond a reasonable doubt which is guaranteed to a criminal defendant by the Due Process Clauses of the *Fifth* and *Fourteenth Amendments* and by Ga. Code § 26-501 (Ga.L. 1968, pp. 1249, 1266). *Leary v. United States*, 395 U.S. 6 (1969); *Tot v. United States*, 319 U.S. 463 (1943); *United States v. Gainey*, 380 U.S. 63 (1965); *United States v. Romano*, 382 U.S. 136 (1965); Note, "The Unconstitutionality of Statutory Criminal Presumptions," 22 Stanford L. Rev. 341 (1970).

7. Georgia Code § 26-2103 (Ga.L. 1971, pp. 344, 345; Section 2 of Act 304, 1971) and Title 72 of the Georgia Code of 1933, as amended, are repugnant to the *First, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* because said statutes and their application to Plaintiffs constitute a classical 'prior restraint' on materials which are presumptively protected under the *First Amendment* to the *Constitution of the United States. Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965). Cf. *Healy v. James*, 408 U.S. 169, 184 (1972) and *Carroll v. President and Commisioners of Princess Anne*, 393 U.S. 175 (1968); *New Riviera Art Theatre v. State*, 412 S.W.2d 890 (Tenn. 1967);

Mitchum v. Florida, ex rel Schaub, 250 S O.2d 883 (Fla. 1971); *State of Indiana, ex rel Blee v. Mohney Enterprises, et al.,* No. 272 A 92, Indiana Court of Appeals, First District, November 29, 1972.

8. Georgia Code § 26-2103 (Ga.L.1971, pp. 344-345, Section 2 of Act 304, 1971) denies due process and equal protection of the laws to Plaintiffs in that said statute makes a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of a single, isolated transaction as to only one of possibly thousands of presumptively protected publications and materials without any showing of traditional elements necessary to constitute a continuing public nuisance, in violation of the *First, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States. Near v. Minnesota,* 283 U.S. 697 (1931); *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971); *New Riviera Art Theatre v. State,* 412 S.W.2d 890 (Tenn. 1967); *State of Indiana ex rel. Blee v. Mohney Enterprises, et al., supra; Freedman v. Maryland, Supra.*

9. Georgia Code § 26-2103 (Ga. L. 1971, pp. 344, 345, Section 2 of Act 304, 1971) violates the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* because it creates a presumption, which is conclusive, that a place of business is a public nuisance on the basis of a single, isolated transaction; said presumption is invalid under the rational connection test for judging said presumptions. *Leary v. United States,* 395 U.S. 6 (1969); *Tot v. United States,* 319 U.S. 463 (1943); *United States v. Romano,* 382 U.S. 136 (1965).

10. Said statutory presumption denies equal protection because it arbitrarily labels a busniess a public nuisance without the necessity for the State to prove the elements of a public nuisance as are set out in Georgia Code § 72-102 and the prerequisites for the abatement of same which are set forth in Georgia Codes, § 72-201, thereby treating this

"public nuisance" differently from others. *Fourteenth Amendment, Constitution of the United States.*

11. Georgia's Nuisance Statute, Title 72 of the Georgia Code of 1933, as amended, as written and or as applied to Plaintiffs, is repugnant to the *Constitution of the United States,* in that it is impermissibly vague, and it is overbroad because susceptible of sweeping and improper application to restrain the dissemination of materials entitled to the protection of the *First* and *Fourteenth Amendments,* all without furthering any overriding state purpose. *McLaughlin v. Florida,* 378 U.S. 184 (1964); *Near v. Minnesota,* 283 U.S. 647 (1931); *Gooding v. Wilson,* 405 U.S. 518 (1972); *Papachristou v. Jacksonville,* 405 U.S. 156 (1972).

12. Georgia's Nuisance Statute, Title 72 of the Georgia Code of 1933, as amended, as written and or as applied to Plaintiffs, is repugnant to the *First* and *Fourteenth Amendments* to the *Constitution of the United States* in that its provisions lack adequate safeguards against undue inhibition of materials which are entitled to the protection of said Amendments. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1957). *Freedman v. Maryland,* 380 U.S. 51 (1965); *Blount v. Rizzi,* 400 U.S. 410 (1971).

13. Georgia Code § 26-2103 (Ga. L. 1971, Section 2, pp. 344, 345) to the extent that it effectuates the suppression of presumtmptively protected materials by closure of a bookstore is, as written and or as applied to Plaintiffs, repugnant to the *First* and *Fourteenth Amendments* to the *Constitution of the United States* because it lacks adequate safeguards against the undue inhibition of materials which are entitled to the protection of said Amendments. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1957); *Freedman v. Maryland,* 380 U.S. 51 (1965); *Blount v. Rizzi,* 400 U.S. 410 (1971).

14. Georgia Code § 26-2104 (Ga. L. 1971, Section 3, pp. 344, 345) is overbroad and repugnant to the *First* and

Fourteenth Amendments to the *Constitution of the United States* in that it makes contraband all obscene materials and advertisements thereof without regard to whether they are intended for private, as opposed to commercial distribution, and without regard to whether they are distributed in a manner that provides adequate notice as to their nature and reasonable precautions against their exposure to juveniles *U.S. v. Orito*, 338 F. Supp. 308 (1970), appeal pending, United States Supreme Court, No. 70-69, reargued November 7, 1972; *Paris Adult Theatre v. Slaton*, No. 71-1051, United States Supreme Court, and *Alexander v. Virginia*, No. 71-1315, United States Supreme Court, arguments heard October 19, 1972. See also *United States v. Lethe*, 312 F. Supp. 421 (E.D. Calif. 1970).

Respectfully submitted,

/s/ D. Freeman Hutton, Esq.

/s/ Gilbert H. Deitch, Esq.

Robert Eugene Smith, Esq.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 7th day of December, 1972.

/s/ D. Freeman Hutton, Esq.

OPINION AND ORDER

Printed in JURISDICTIONAL STATEMENT
A-1 through A-17 inclusive
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